PARKS, RECREATION AND OPEN SPACE

#5

#5

INSTITUTE OF GOVERNMENTAL
STUDIES LIBRARY

NOV 16 1983

UNIVERSITY OF CALIFORNIA

METHODS OF PRESERVING OPEN SPACE

SAN MATEO COUNTY PLANNING COMMISSION

METHODS OF PRESERVING OPEN SPACE

SAN MATEO COUNTY PLANNING COMMISSION

December 1959

Digitized by the Internet Archive
in 2025

https://archive.org/details/C124919810

There are perhaps four major methods by which a county or city can assure the preservation of open space: (1) acquiring the land directly, (2) holding development rights, (3) giving tax concessions in return for specific contractual obligations relating to development, and (4) zoning. Each of these has certain possibilities and certain problems, but elements of each should be in any official program for the preservation of undeveloped lands in highly developed urban areas.

1. DIRECT ACQUISITION

A. Outright Purchase

Outright purchase is of course the most certain method of assuring that lands will remain undeveloped as long as the government feels this is in the community's welfare, but governments have frequently decided that it was cheaper to use publicly owned parks and recreation land for highways or for the sites of schools and other public facilities. Key lands acquired in a program designed to maintain adequate amounts of open land within and surrounding built-up areas ought to be differentiated from land acquisitions by government for customary purposes. If the public sympathizes with the reasons for maintaining undeveloped areas and gives its support to such a program, the government should in return bind itself in some way to preserve the properties acquired with this understanding in perpetuity.

The public has access to land directly owned by government agencies, while open but privately owned land is ordinarily closed against public trespass. For certain tracts of spectacular scenic attractions or where public use is of some importance, such as beaches, acquisition is the most desirable method of assuring continued openness. There is some concern for the fact that government owned lands are off the tax rolls, but tax receipts for many properties of this type would be minimal. A detailed study of the costs to the government of supplying certain urban services would give some indication that public ownership of key lands is less costly than permitting private conversions to accommodate urban uses. The fact of tax exemption is not by itself a strong argument against public ownership. The real test of the relative desirability of public and private ownership is the size of the net return to society, financial and other, contributed by each form of ownership. (1) The increasing intensity of use of outdoor recreation areas is in itself something of an indication of the need and demand for direct ownership of appropriate lands.

B. Gifts

Lands are occasionally offered as gifts to public agencies, and this can be encouraged to some degree by allowing certain concessions for such gifts. Holders of large acreages or lands which have been in one family for some time often would like to

see a holding remain in one parcel, but for one reason or another -- death, the number of heirs, tax problems -- these holdings are being split up. Owners can often be persuaded to donate their land for future park use. In accepting the gift, the government can make arrangements for allowing the owner to remain on the land for a set time, or until death, with taxes limited or abated. (2) There should of course be no reluctance on the part of the public agency about accepting gifts of appropriate property.

C. Purchase-Leaseback

If owned, facilities for intensive park uses need not be developed for a time. A method leading to eventual public use is the purchase-leaseback system becoming popular in private industry. The lands are owned by the public agency, which leases them back perhaps to the original owner, for a use compatible with the ultimate use intended by the government. The federal government has used this to some extent in the national park system, particularly in the Great Smoky Mountains National Park, where purchased farms have been leased back to the owners, and the Navy has tried it for protection of certain of its air bases. The land is off the tax rolls, but the government receives some income from the lessee.

D. Purchase-Saleback

Another possibility involving acquisition is the purchase-saleback method. Lands are bought by the public agency and sold, usually back to the original owner, with certain deed restrictions. This would be as effective as acquiring development rights, and contrary to the purchase-leaseback system, the land remains on the tax rolls. In June, 1959, the California Legislature enacted a law authorizing any county or city to use these two methods of purchase-lease or purchase-saleback for protecting urban open spaces, with covenants or contractual arrangements to limit future use of the property to an open use (Ch. 12, Div. 7, Title 1, Govt. Code).

E. Excess Condemnation

The use of excess condemnation for aesthetic control is usually applied in connection with the building of large-scale public works and particularly highways to protect the surroundings of the facility. This involves the condemnation of the whole tract affected rather than merely the section on which or through which the facility will be constructed. The California Constitution authorizes the State, its cities or counties to condemn land

> "in and about and along and leading to public works and within 150 feet of a public improvement, providing that when parcels lie only partially within the 150 feet such portions may be acquired which do not exceed 200 feet from the closest boundary."

This allows public control wider than that essential for construction purposes, and is particularly useful in controlling commercial and other development in sections fronting on highways. This is relevant in a program seeking to maintain the aesthetic qualities of the environment.

2. DEVELOPMENT RIGHTS

The purchase or otherwise acquiring of development rights or easements in land is a second method of preserving open space. It is short of direct acquisition and probably the most effective of the methods wherein land remains in private ownership. In effect, the designated agency receives the right to change the use of the land, and by not exercising that right keeps the land in its present use. (3) The owner retains title to the land, but must use it in accordance with the contract made; such easements run with the land. Various stipulations may be made in the contract, including a time limit, although such rights could be acquired in perpetuity. The contract itself should contain a clause reverting the right of development to the original owner or his heirs or assigns or at least giving these individuals first option on these rights, if the government should decide it is no longer desirable to keep the land in open use. Reversion of rights may also be desired in a situation where the government succeeds in securing only a few parcels of a larger whole. Although each contract will vary somewhat, some general form is possible.

The State has recognized the potential significance of the holding of development rights, and in the bill referred to earlier (Ch. 12, Div. 7, Title 1, Govt. Code) declared it to be in the public interest to maintain open spaces in metropolitan areas.

The law authorized any city or county to acquire

> "by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment."

The appropriate government agency has the right to condemn such development rights, but the most effective method would involve negotiation with willing landowners to prevent legal complications. (4)

Although the advantages to certain groups of an open space preservation program should be sufficient to induce the offering of development rights by gift, a policy in relation to eventual purchase must be defined by the responsible government. The State declared in the bill quoted above:

> "that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended."

Potential tax savings provide the major material advantage to property owners, although many who are concerned with maintaining the natural scenic beauty of their countryside will find other compensations in being assured that the character of their area will remain much the same. Since the speculative possibility for urban development would be gone when the rights of development are assigned, the valuation of the land should be reduced and owners given a preferential tax assessment. (5) Pressure to sell would be removed and certain useful activities, including agriculture and private recreation, could continue with a lessened burden.

There is some question as to the appropriate repository of this portion of the bundle of rights in property. A state agency might be most effective, operating on a wider basis, but since much of public interest revolves on local pride and concern, a local or regional agency would probably obtain most cooperation. Since the problem of vanishing open space has a strong regional aspect, the formation of a public regional agency, whether of the general government type or a special purpose district, with wide powers of condemnation and expenditure of public monies, could be useful in carrying out the program envisioned. On the other hand, a non-profit private corporation -- preferably a regional group -- could be formed to encourage the donation of such rights and to act as repository. The development rights could probably be held equally well by either a public or a private group, as long as the obligation is firm. Since there are no regional groups at present operating in the Bay Area, counties must take action on their own. If it seems desirable, a contract could include provisions for transferring the rights acquired to a regional or state agency formed at a later date for such a purpose.

Easements and development rights have been used to some extent by various public agencies. Their great virtue is that they seem adaptable for several purposes. Scenic easements have been acquired by the National Park Service, particularly in connection with the Shenandoah Valley, the Blue Ridge and the Natchez Trace Parkways and some other major highways, and by Monterey County to protect the Bixby Canyon on the Big Sur Coastline. (6) The Navy has acquired aviation easements for safety areas around air bases, with the new base at Lemoore, California (Fresno and Kings Counties), a notable example. Among other governments, the Maryland and Ohio highway departments, the Massachusetts State Commissioner of Natural Resources, and the Washington, D.C. National Capital Parks and Planning Commission have all been specifically empowered to take and to accept rights in land. (7) A bill in Pennsylvania has been drafted in which the State's Department of Forest and Waters would

work with counties in selecting conservation areas and securing easements from owners. (8) California provides liberal authority through its navigation and other property easement laws.

3. TAX CONCESSIONS

The third major tool for such a program, tax concessions, involves taxing at a preferential rate in return for certain contractual obligations involving the use of the land. One possibility is assessing property in the regular way with a part or all of the total tax deferred until development takes place. Deferred taxes could climb high enough to make a change in use unprofitable. This has been used primarily in connection with forest areas, with taxes deferred until the timber crop is ready for harvest, allowing timber to mature without putting an annual tax burden on the owner. New Hampshire, Wisconsin, Michigan and California all use this to some extent. (9) The National Capital Parks and Planning Commission has the authority to reserve lands for a fixed period for public acquisition, and taxes are uncollected for this period, giving the government body time to schedule its purchases and yet not penalizing the owner by imposing taxes on land that could not be used.

Another side of this is the imposition of a development charge at the time the land shifts to an urban use, to help defray costs of facilities to service the newly developed areas. A number of places, notably in the east and particularly in New Jersey, have tried this, charging up to $300 for each building permit issued.

On a more comprehensive scale, Indiana has proposed a law to protect rural areas, which authorizes planning commissions to grant personal and real property tax deferrals to farm land withheld from premature urban residential development in accordance with a comprehensive plan. The commissions are also authorized to set aside open spaces for parks and other community facilities in advance of need, on the theory that to wait for the need to become manifest will be too late. The bill includes a provision authorizing covenants restricting the use of farm land to farm purposes.

There are problems in a tax-concession program and even in reforming the present taxing system so that it does not work against the other plans and purposes of government, but this should not be sufficient reason for ignoring its possibilities. The California Constitution requires assessment at full cash value, which courts have standardized as

> "the price the property would bring if offered on the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other ..." (DeLuz Homes v Co. of San Diego, 45 Cal. 2d 546)

This necessarily means a value based on the highest and best use of the property. The Court has said:

> "the question is not what its value is for a particular purpose, but its value in view of all the purposes to which it is naturally adapted." (Wild Goose Country Club v Co. of Butte, 60 Cal. App. 339)

This has been assumed to be an urban use.

The tax system is not designed as a land-use planning tool, but the pressures created by taxation have sometimes forced land-use changes. The State has attempted to meet this problem, at least as it affects farm lands, by stating that as a matter of procedure,

> "in assessing property which is zoned and used exclusively for agricultural or recreational purposes, and as to which there is no reasonable probability of the removal or modification of the zoning restriction within the near future, the assessor shall consider no factors other than those relative to such use." (effective September 11, 1957, California Government Codes, section 4025).

The key phrase is "reasonable probability of the removal or modification of the restriction," and since assessors have not been sure that such legislation was meant to be permanent this law has had little effect on assessing practices.

4. ZONING

The fourth major tool, establishing zones which would prohibit urban uses, can be expected to have only temporary effectiveness. Flood plain, earthquake fault and airport zoning are probably justifiable on a more or less permanent basis as falling within the purposes -- health, safety and general welfare -- covered by the policepower of government. Some other types of zoning, however, are aimed at achieving a state less subject to measurement. Zoning to maintain open space, for instance, can work as a preliminary to purchase, but if the community does not act fairly quickly, "the owner is subject to what amounts to condemnation without compensation." (10) If the police power were used for such a purpose, it could incur adverse public reaction.

Zoning land exclusively agricultural is the major way in which zoning regulations have been used to preserve open space, although such zones have not been established with this as the primary objective. This zone has been established ordinarily only at the request of land owners, and resulting districts have been without relation to a soil plan or a balancing of land uses. Since owners would strongly resist an irrevocable commit-

ment by legislation, particularly if they had made the original request, such zoning is effective only as long as farmers wish to continue farming.

The owner who wishes to change this regulation of his property has several ways out, including voluntary annexation to a neighboring city. The older problem was that many cities took over adjacent farm lands without the consent or desire of the owners. The State attempted to end this practice through the so-called Greenbelt Law (Chapter 1712, 1955) which provided that

> "any territory which is by consent of the owners zoned and restricted for agricultural uses exclusively pursuant to a master plan for land use in any county, shall not, while it is so zoned, be annexed to a city without the consent of the owners."

Supported by this law, Santa Clara County made the first efforts in using the exclusive agricultural zone, and at the present time, some 40,000 acres in the county are under similar controls, including some airport and golf course lands. San Mateo County zoned about 8,500 acres exclusively agricultural this summer. Also in this area, Contra Costa County includes a provision for an exclusive agricultural zone in its zoning ordinance.

Other areas have also experimented with protecting their farm lands by ordinance, including North Carolina, with a regional rural zoning agency which includes portions of two counties; Florida which has attempted agricultural zoning on the state level in a section near Tampa; and Wisconsin. Agricultural zones are not intended as ends in themselves; but rather as a means of implementing a predetermined plan of land use. In some sections the economic importance of agriculture is more obvious than in others.

To a degree, farm owners have agreed to and desired exclusive agricultural zoning to allow themselves the chance to continue farming and to resist urban pressures as a group. They have hoped that such evidence of their intentions to hold firm would result in tax reductions, but this has not happened on the whole. Since agricultural zoning is usually established at the request of the owners, it can be ended in the same way. However, greenbelt areas usually do have lower taxes than similar areas, it is reported, because there are fewer special districts and because greenbelt zones usually have few of the urban services which are so costly. To the extent then that this type of legislation creates the opportunity for more ordered development, landholders within such a district do receive something of a tax break.

FOOTNOTES

1. Dana, Samuel Trast and Myron Krueger, California Lands, Ownership, Use and Management, Washington, D.C.: The American Forestry Association, 1958, P. 161.

2. Moses, Robert, New York City Commissioner of Parks.

3. Whyte, William H., Jr., "Urban Sprawl," in The Exploding Metropolis, Doubleday Anchor Books, Doubleday & Company, 1958, P. 133.

4. Ibid

5. Whyte, "Open Space--and Retroactive Planning," in Planning 1958, Chicago: American Society of Planning Officials, 1958, P. 75.

6. Whyte, "A Plan to Save Vanishing U. S. Countryside," Life, Vol. 47, No. 7, August 17, 1959, P. 96.

7. "The City's Threat to Open Land," in Architectural Forum, Vol. 107, No. 1, January, 1958, P. 164.

8. Whyte, "A Plan to Save Vanishing U. S. Countryside," P. 100.

9. "The City's Threat to Open Land", loc. cit., P. 164-5.

10. Whyte, "Open Space," loc. cit., P. 72.

U.C. BERKELEY LIBRARIES
C124919810